CASE NO. 88-292

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

RUDY G. REINHARD AND THE ESTATE OF RICHARD J. ZOLPER, DECEASED, THROUGH AND BY IRENE M. ZOLPER, THE PERSONAL REPRESENTATIVE OF THE ESTATE OF RICHARD J. ZOLPER,

PETITIONERS,

V.

BARBARA CONNER,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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A. MANY CIRCUITS ARE APPLYING THE QUALIFIED IMMUNITY DEFENSE IN A WAY THAT IS CONTRARY TO THE SPIRIT AND EXPRESS HOLDING OF **HARLOW V. FITZGERALD**.

In Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the court held:

> "It is not difficult for an ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decision-maker's mental process are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under normal summary judgment standards, be sufficient [to force a trial]..." p. 2738, S.Ct.

As previously argued, this quote compels two conclusions:

> 1. The standards under which a qualified immunity defense is to be measured is different from normal summary judgment standards.
>
> 2. Where a case presented under a qualified immunity defense presents a situation involving subtle questions of constitutional law and a decisionmaker's mental process, the court should not

permit a plaintiff to "create" a material issue of fact.

Respondent states in its brief in opposition to certiorari that most circuits have held, in reviewing qualified immunity motions, that all factual disputes must be resolved in favor of the non-movant. These circuits have expressly held that "normal" summary judgment rules apply to qualified immunity cases. This does not square with the holding of Harlow, supra, as quoted above. These circuits are erroding the well considered underpinnings of Harlow, supra, and the other qualified immunity cases.

By reviewing the Seventh Circuit's holding herein, this Court can clarify and expressly state the precise standard to be used in qualified immunity cases.

B. THIS COURT SHOULD ADDRESS THE APPLICATION OF QUALIFIED IMMUNITY TO A **MT. HEALTHY V. DOYLE** TYPE CASE.

Government officials are immune from suit if their actions do not violate any clearly established constitutional rights. Harlow, supra The rule of retaliatory discharge consists of two elements: was the employee's action constitutionally protected and was the constitutionally protected activity a substantial or motivating factor in the employee's discharge. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)

Thus, the cause of action is established by allegations of the exercise of a constitutional right by a public employee, subsequent discipline by the employer, and a claim that the discipline was substantially motivated

by the exercise of the constitutional right.

The Seventh Circuit's current application of qualified immunity in a Mt. Healthy context considers only the issue of whether the "conduct" is clearly protected. Once the protected nature of the conduct is established, an employee need only allege that constitutionally-protected conduct caused the discipline. The employer's denial of that allegation creates a material issue of fact as to whether the protected conduct resulted in the discipline and, therefore, compels a trial. The result of this rule is if the employee can allege protected conduct and subsequent discipline, the qualified immunity defense is nulified.

This Court has never discussed qualified immunity in a Mt. Healthy type

case. In a Mt. Healthy context, the question should not be considered in a light most favorable to the plaintiff because the purpose of qualified immunity is emasculated. Petitioners contend that the court should consider if, under a standard of reasonableness, whether the public-sector employer's discipline was motivated by the protected conduct.

C. THIS CASE PRESENTS A QUESTION OF LAW NOT SETTLED IN THE UNITED STATES.

At page 7 in the respondent's brief in opposition, the respondent argues that the constitutional rights involved in this case were clearly established at the time of the discharge. The cited cases are clear enough but not applicable.

After the plaintiff's speech at the Board of Ethics meeting, her supervisor in writing requested that she not speak

in a manner viewed as on behalf of his department. Subsequently, the respondent orally stated to her employer that she would do the same thing again. Only then was the respondent discharged for insubordination.

Aware that it is not appropriate to argue the merits at this point, petitioners assert that there is no law concerning factual situations reasonably analogous to this. The real issues in this case are:

> 1. Can a public-sector supervisor instruct a public-sector employee not to speak in a manner viewed as on behalf of the public-sector supervisor's office?
>
> 2. If such instruction is permitted, may the public-sector employer discipline for a refusal to follow that instruction?

These issues have not been addressed and are of significant precedential value on a nation wide basis on an employer's authority over subordinates.

The court should address this unique issue and clarify what constitutes a "clearly established" right in the context of qualified immunity.

D. THIS COURT SHOULD DETERMINE THE STANDARD TO BE USED IF A PUBLIC OFFICIAL IS IN PRIVITY WITH HIS OR HER EMPLOYER FOR THE PURPOSES OF RES JUDICATA.

Only two circuits have considered whether public officials sued in personal capacity are in privity with their employer under federal common law. However, respondent misleads this court by implying that Headley v. Bacon, 828 F.2d 1272 (8th Cir. 1987), stands for the proposition that this lack of privity exists in all cases. Headley, supra, lists several factors to be considered by the court in making that determination.

Only the instant case implies that as a matter of federal common law public-sector officials are never in

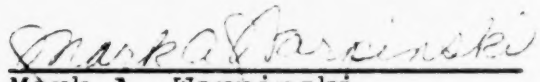
privity with their employer. Any case that can be read in such a manner is a dangerous precedent. Petitioners submit that privity should be determined on a case-by-case basis by considering if the actions complained of took place in the course of normal employment and in official capacity. This rule encourages responsible public-sector employee activity and encourages public-sector employment.

The Seventh Circuit's holding below creates insurance headaches for public-sector employers who want to responsibly protect their officials, discourages public-sector employment by making all public-sector officials liable for suit both on official and personal grounds, and further confuses the already complicated mandatory employee subrogation provisions of many

states. The federal common law should be clarified by this Court in this case.

Dated at Green Bay, Wisconsin, this 19th day of September, 1988.

Respectfully submitted,



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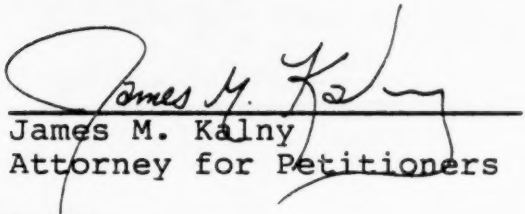

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